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No. 80-289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854
AND UNITED MINE WORKERS OF AMERICA,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD AND
AMAX COAL COMPANY, A DIVISION OF AMAX, INC.
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Are trustees of multiemployer trust funds established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 "representatives for collective bargaining" within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act? *

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* The National Labor Relations Board has also filed a petition for a writ of certiorari to review the judgment in this case. *See* NLRB v. Amax Coal Co., No. 80-692 (filed October 27, 1980). The Board's petition presents the same question that is presented here.

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE *

Amicus Curiae National Stabilization Agreement of the Sheet Metal Industry Trust Fund ("SASMI" or "the

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* Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters manifesting such consent have been filed with the Clerk of the Court.

Fund") is a trust fund created pursuant to Section 302 (c) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c), and established in 1973 in accordance with collective bargaining agreements between local member unions of the Sheet Metal Workers' International Association ("SMWIA") and various sheet metal contractors and contractor associations. SASMI is currently administered by six trustees, half of whom are selected by labor and management, respectively. Approximately 25,000 sheet metal workers nationwide, employed by more than 2,500 companies, are participants in SASMI.

SASMI is a comprehensive, unified supplemental employment compensation plan developed in light of the unique needs of the sheet metal industry. The Fund is a separate entity, organized and administered independently of SMWIA and the employers, and operated for the sole and exclusive benefit of its participants and beneficiaries. SASMI was created to foster the economic welfare and security of employees in an industry vulnerable to economic instability; its primary goal is to minimize hardships caused by factors beyond the control of employees. To this end, benefits are paid to supplement in part the loss of wages incurred during periods of less than full employment. To date, SASMI has paid close to $43 million of these unemployment and related benefits to needy sheet metal worker beneficiaries and their families.

The continued administration of the SASMI Trust Fund was recently put in issue when an association of employers filed unfair labor practice charges against the Sheet Metal Workers' International Union, its President, and Local 493, the local union with which the association had signed a collective bargaining agreement, contending that these parties had violated Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, by

insisting on SASMI and striking to ensure that the employers would include SASMI participation as one of the benefits of the contract. On review of those unfair labor practice charges, the National Labor Relations Board rejected the very contention accepted by the Third Circuit in the instant proceeding—that trustees of a multiemployer trust fund are representatives for purposes of collective bargaining. *Sheet Metal Workers' International Association*, 234 N.L.R.B. 1238 (1978).

The Board's decision is currently under review before the United States Court of Appeals for the Fifth Circuit, which heard argument on the issue on October 29, 1980. The legal issues at stake in the Fifth Circuit litigation concern the orderly administration—indeed the existence —of SASMI and other multiemployer trust funds, and for that reason SASMI sought, and was granted, leave to file an Amicus Curiae brief in the Fifth Circuit. Since one of the issues raised in the instant petition is identical with the issue that SASMI addressed in the Fifth Circuit litigation, SASMI also seeks to participate as an amicus in this Court to urge review of this important question concerning the interrelationship of statutory schemes governing labor relations and fiduciary duties of trust funds, and reversal of the Third Circuit's decision in this case.

SUMMARY OF ARGUMENT

The Third Circuit has decided important questions concerning federal labor and trust fund statutes in a manner inconsistent with congressional intent and likely to disrupt the orderly administration of multiemployer trust funds. Indeed, the legislative history of the recently enacted Multiemployer Pension Plan Amendments Act of 1980 evidences explicit congressional disapproval of the Third Circuit's decision here at issue, and provides an indication of the disruptive impact of this decision in

the important area of administration of labor-management trust funds.

The Third Circuit erred in holding that fund trustees are "representatives for collective bargaining" within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act. The duties of trustees appointed by labor and management to administer a joint labor-management trust fund differ dramatically from those of collective-bargaining agents appointed by labor and management. It is clear from the legislative history of the LMRA that Section 8(b)(1)(B) was not intended to encompass trust fund administration. The duties imposed on collective bargaining representatives cannot be reconciled with those of fund trustees and, indeed, are antithetical to the fiduciary obligations assumed by fund trustees.

Fund trustees are fiduciaries under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and their sole responsibility is to the participants and beneficiaries of the trust fund. Clearly Congress did not intend that a trustee serve two masters: a trustee cannot exercise undivided loyalty to the trust fund participants and beneficiaries and at the same time be completely faithful to his appointing party, as Section 8(b)(1)(B) would require. The Third Circuit's decision thus poses a grave threat to the proper and orderly administration of labor-management trust funds, and it should be reversed.

ARGUMENT

I. The Petition Should Be Granted Because The Decision Below Conflicts With Decisions Of This Court And Lower Federal Courts As To Congressional Intent In Enacting Section 8(b)(1)(B) Of The National Labor Relations Act.

Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of col-

lective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1)(B). As this Court emphasized in *Florida Power & Light Co.* v. *IBEW Local 641*, 417 U.S. 790 (1974), in enacting this provision Congress was "exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment." *Id.*, at 803. Finding no indication of an intent to go beyond this "clearly focused congressional concern," *id.*, this Court there rejected the National Labor Relations Board's broader interpretation of the statute to proscribe union discipline of supervisor members who had crossed picket lines to perform nonsupervisory functions during strikes. *Florida Power & Light* necessitates review of the decision below, which would require the Board to interpret Section 8(b)(1)(B) much more broadly than it had in that case.

As this Court recognized in *Allied Chemical Workers Local 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170 (1971), "the union's role in the administration of the fund is of a far different order from its duties as collective-bargaining agent." Under the federal labor laws, the term collective-bargaining identifies a process that "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). *See also NLRB* v. *Boss Manufacturing Co.*, 118 F.2d 187, 189 (7th Cir. 1941). No such process is involved in the administration of trust funds. Here, the agreement already has been reached, and the responsibility of the trustees is to administer the fund in accordance with its terms and in the sole interest of its participants and beneficiaries.

Similarly, the right to strike to insist on acceptance of mandatory subjects of bargaining is at the "core" of the collective bargaining process contemplated by Congress. *Division 1287, Amalgamated Association of Street*

Employees v. *State of Missouri*, 374 U.S. 74, 82 (1963). No such adversarial resolution is contemplated in the case of Section 302 trust funds, however. To the contrary, Section 302 specifically requires that these funds provide for the resolution of deadlocks in questions of fund administration by a neutral person or impartial umpire appointed by the trustees or the court, 29 U.S.C. § 186(c)(5)(B).

It is thus not surprising that the Court of Appeals for the Ninth Circuit rejected an earlier attempt to analogize the process of trust fund administration to collective bargaining "as not supported by authority." *Rehmar* v. *Smith*, 555 F.2d 1362, 1370 (9th Cir. 1976) (footnote omitted.)[1] Logic and precedent compel the same conclusion here.

The essence of a Section 8 collective bargaining representative is total loyalty to the party he represents.

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[1] The Third Circuit's position will produce a number of disruptive consequences. For example, if trust fund administration constitutes "collective bargaining," it would follow that the trustees' activities are subject to Board regulation under Sections 8(a)(5), 8(b)(3) and 8(d) of the NLRA, thus thrusting the Board into an area that Congress has not committed to it. *Cf.* Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 499 (1960).

Similarly, Sections 405(a)(3) and 405(b)(1)(A) of ERISA, 29 U.S.C. §§ 1105(a)(3), (b)(1)(A), impose an obligation on a trustee to prevent any other trustee from breaching his fiduciary responsibilities to the employee beneficiaries. But it is a violation of Section 8(b)(1)(B) of the NLRA for a union representative to interfere with the employer's collective bargaining agent's performance of his duties in accord with the employer's instructions. American Broadcasting Companies v. Writers Guild, 437 U.S. 411, 436 (1978). Thus, if trustees are "representatives" of their appointing parties in ongoing "collective bargaining," a labor-appointed trustee might commit an unfair labor practice merely by fulfilling his obligation under ERISA to prevent an employer-appointed trustee from breaching his fiduciary responsibilities.

"The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires." *Local No. 2150, IBEW*, 192 N.L.R.B. 77, 78 (1971). The Third Circuit's decision in this case appears to recognize that the fund trustees owe some fiduciary obligations to the fund's participants and beneficiaries, but maintains that the trustees are required to advance the interests of the parties appointing them "[i]nsofar as it is consistent with their fiduciary obligations." *Amax Coal Co.* v. *NLRB*, 614 F.2d 872, 882 (3d Cir. 1980). Clearly Section 8(b)(1)(B) does not contemplate or permit such divided loyalties, and labor-management trust funds cannot be properly administered if a trustee must constantly guess as to which party he is representing on a particular issue, or the extent to which the interests of the fund's beneficiaries can be compromised or accommodated with the narrower interests of that trustee's appointing party.[2]

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[2] The disruptive impact of analogizing trust fund administration to ongoing collective bargaining has been perceptively noted by former Judge Renfrew:

> "The function of pension fund trustees is significantly different from the roles of union and management in ordinary labor affairs such as contract negotiations or grievance matters. The duty of fair representation is imposed upon a union because by law it is the exclusive representative of the bargaining unit. Pension fund trustees, on the other hand, are not advocates; they are fiduciaries. All trustees, labor and management representatives alike, have a duty to take those actions which they believe to be in the best interests of the fund's beneficiaries.
>
> Although the requirement of equal representation among trustees might suggest that a pension fund board is expected to function in an adversarial way, few things could be more inimical to the proper management of a pension fund. A pension fund must not be administered on the assumption that the excesses of labor and management trustees will cancel each other out. To the extent that the present requirements

It is clear that Congress did not intend the incongruous results that will be produced by the Third Circuit's decision. Joint trust funds had been in operation for more than 25 years when Congress enacted ERISA, and Congress obviously is familiar with the collective bargaining process and with the undivided loyalties that the parties demand of their collective bargaining representatives. It defies logic to suggest that Congress would have enacted the strict fiduciary standards of ERISA if it thought that the trustees of such funds also owed the obligations to their appointing parties that Section 8(b)(1)(B) would impose if they were collective bargaining representatives.

The legislative history of the recently enacted Multiemployer Pension Plan Amendments Act of 1980 reveals that Congress harbored no such intent, and that it anticipates that the Third Circuit's opinion in this case will be reversed. For example, Senator Randolph referred specifically to the decision below, expressed the opinion that the case would be "overturned on appeal," and asked whether Congress had "ever expressed an intent under ERISA or any other Federal law that an agency status should or does exist between trustees and their appointers." 126 Cong. Rec. S 10104 (daily ed. July 29, 1980). Senator Williams, the sponsor of the 1980 amendments, responded that "[i]n all instances the actions of the trustees must be made with the sole interests of the plan's beneficiaries in mind." *Id.* Similarly, in the House, Congressman Thompson referred to the Third Circuit decision as "an erroneous interpreta-

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of § 302 encourage this attitude, Congress should consider amending the statute."

Morgan v. Laborers Pension Trust Fund, 433 F.Supp. 518, 530 (N.D. Cal. 1977) (footnote omitted). *See also* Renfrew, *Fiduciary Responsibilities Under the Pension Reform Act*, 32 Bus. Lawyer 1829 (1977).

tion of both ERISA and federal labor law [which] does not reflect congressional intent." 126 Cong. Rec. H 7902 (daily ed. August 26, 1980). These recent expressions of legislative intent, although not determinative with respect to the purpose of earlier legislation, are clearly a relevant consideration, especially since the recent amendments are "another major step in an evolving pattern of regulation." *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 194 (1967).

Finally, it is important to recognize the logical impact of the Third Circuit's holding that fund trustees are Section 8 representatives of their appointing parties for collective bargaining purposes. Section 8(b)(1)(B) reflects a congressional intent to preclude union coercion in the employer's selection of his bargaining representatives. *Florida Power & Light Co., supra.* If the trustees of Section 302 trusts were deemed to be representatives for collective bargaining purposes, it logically would follow that a union could not insist on any individual employer's participation in a multiemployer fund unless that employer were given the right to select each and every employee trustee, and the same right would have to be afforded each successive employer joining the fund. As a practical matter, this would eliminate collectively-bargained multiemployer trust funds altogether since each employer could insist on powers to appoint all employer representatives that would render fund operation impossible. That result is clearly at odds with congressional intent.[3]

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[3] Multiemployer funds offer stability and other economic advantages that cannot be obtained by smaller plans, and Section 302 clearly contemplates multiemployer funds, stating that its provisions shall not prohibit payments "to a trust fund established . . . for the sole and exclusive benefit of the employees of such employer, and their families and dependents (*or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and depend-*

The courts have recognized that the equal representation requirement of Section 302 does not mean that each employer contributing to a welfare and pension fund has the right to select its trustees. *See e.g., Denver Metropolitan Association* v. *Journeyman Plumbers Local 3*, 586 F.2d 1367, 1374-75 (10th Cir. 1978); *Associated Contractors of Essex County, Inc.* v. *Laborers International Union*, 559 F.2d 222, 227 (3d Cir. 1977); *Blassie* v. *Kroger Co.*, 345 F.2d 58, 72 (8th Cir. 1965); *Mechanical Contractors Associations* v. *Huico, Inc.*, 93 L.R.R.M. 2329 (W.D. Wash. 1976); *Local 169, International Brotherhood of Teamsters* v. *Teamsters Health & Welfare Fund*, 327 F.Supp. 260, 264 (E.D. Pa. 1971). *See also Sheet Metal Workers' International Association*, 234 N.L.R.B. 1238, 1244-1245 (1978), petition for review pending *sub nom. Central Florida Sheetmetal Contractors Ass'n* v. *NLRB*, No. 79-2396. It would be most inappropriate to impose such a requirement through Section 8(b)(1)(B).

II. The Petition Should Be Granted Because The Decision Below Conflicts With The Decisions Of Other Federal Courts Holding Fund Trustees To Be Fiduciaries Whose Sole Responsibility Is To The Participants And Beneficiaries Of The Trust Fund.

Under the provisions of ERISA, fund trustees are fiduciaries,[4] whose obligation under Section 404 is to

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ents) . . . ." 29 U.S.C. § 186(c)(5) (emphasis added). Similarly, ERISA made specific provision for multiemployer plans. *See e.g.*, Internal Revenue Code § 414(f), 26 U.S.C. § 414(f); 29 U.S.C. § 1002(37).

[4] Section 3 of ERISA, 29 U.S.C. § 1002(21), estabilshes that each fund trustee is a fiduciary, providing in pertinent part:

> (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any

act "solely in the interest of the participants and beneficiaries" of the fund. 29 U.S.C. § 1104(a)(1). *See also, id.*, § 1106(b)(2). This statutory obligation, which likewise is recognized in the common law, *Blankenship* v. *Boyle*, 329 F.Supp. 1089, 1094 (D.D.C. 1971), tolerates no divided loyalties of the kind mandated by the decision below. *Cf. NLRB* v. *Construction & General Laborers' Local 1140*, 577 F.2d 16, 21 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979); *Blassie* v. *Kroger Co.*, *supra*, 345 F.2d at 75-76.

The duties set forth in Section 404 of ERISA reflect a federal codification and elaboration of the common law prudent man rule and the requirement of undivided loyalty to the trust beneficiaries. Clearly a fund trustee cannot serve two masters: he cannot exercise undivided loyalty to the trust fund participants and beneficiaries and at the same time be completely faithful to the party that appointed him, as Section 8(b)(1)(B) would require if he also were a collective bargaining representative.[6]

> authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Thus, the very discretion suggested by the Third Circuit as a basis for its decision that fund trustees are "representatives" in an ongoing collective bargaining process has precisely the opposite effect: it conclusively establishes that they are fiduciaries under ERISA. *See also* Department of Labor ERISA Interpretive Bulletin, 29 C.F.R. § 2509.75-8, 40 Fed. Reg. 47491 (October 9, 1975).

[6] Judge Gesell highlighted this point in Blankenship v. Boyle, *supra*, 329 F.Supp. at 1094, by quoting with approval the following comment of counsel:

> You can't be just a little bit loyal. Once you are a trustee, you are a trustee, and you cannot consider what is good for the Union, what is good for the operators, what is good for the Bank, anybody but the trust.

The Courts of Appeals for the District of Columbia and Ninth Circuits have rejected the position adopted by the Third Circuit. For example, in *Miniard* v. *Lewis*, 387 F.2d 864, 865 n. 5 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968), the United States Court of Appeals for the District of Columbia Circuit rejected the contention that union-appointed fund trustees owed a duty to represent the interests of all employees in the bargaining unit, stating:

> Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employers or the union. Accord, United Marine Division v. Essex Transportation Co., 216 F.2d 410, 412 (3rd Cir. 1954).

The District of Columbia Circuit subsequently addressed the Third Circuit's essential position more directly in *Lamb* v. *Carey*, 498 F.2d 789 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 869 (1974). While recognizing that trusts established in accordance with the LMRA must allow for equal representation of employers and employees in their administration, the court squarely rejected the notion that the statutory equal representation requirement compromised each trustee's fiduciary obligation to administer the fund solely in the interests of its beneficiaries:

> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the beneficiaries. However, the District Court . . . made the unchallenged finding that '[c]lose collaboration with the Union is required in an atmosphere of mutual confidence to further the objectives and the effectiveness of the Fund.' This places an even more stringent requirement on the actions of a

> Union Trustee, a requirement which is here of crucial importance.

498 F.2d at 793. Accordingly, the court of appeals admonished that the union could not replace a union-appointed trustee merely because it disliked him, *id.*, as it might if that trustee were simply its own representative.

The Court of Appeals for the Ninth Circuit has similarly concluded that fund trustees have a duty to exercise "independent judgment" in matters of trust administration, a conclusion plainly at odds with the Third Circuit's imposition of Section 8(b)(1)(B) duties on fund trustees. *See Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975):

> We wish to emphasize, however, that trustees have a duty to exercise their independent judgment in administering trust funds established under § 302 of the Labor Management Relations Act. Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory.

Finally, it should be noted that the decision below is also at odds with earlier Third Circuit decisions in *United Marine Division* v. *Essex Transportation Co.*, 216 F.2d 410 (3d Cir. 1954), and *Mechanical Contractors Association* v. *Local Union 420*, 265 F.2d 607 (3d Cir. 1959).[6]

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[6] In *United Marine Division, supra*, the Third Circuit rejected the contention that union-appointed trustees were "representatives of . . . employees" within the meaning of Section 302 of the LMRA, stating:

> We think that in this instance the promise of the employer . . . was not a promise 'to any representatives of any of his employees.' The promise alleged was to pay these trustees. These trustees were not, in our judgment, representatives of

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1980

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the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out.

216 F.2d at 412 (footnote omitted). That position was reaffirmed in *Mechanical Contractors Association, supra,* where the Third Circuit explained that a person designated by a union in a fund meeting the standards of Section 302(c)(5) is not a "representative" within the meaning of that section, and thus that employer payments to such funds are not in violation of Section 302. 265 F.2d at 611.